

APPEAL NO. 060233
FILED APRIL 4, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 4, 2006. The hearing officer resolved the disputed issues by deciding that the compensable injury of ____, includes a herniation at C3-4 and C5-6 but does not include disc bulging at C4-5 and C6-7, lumbar spondylosis at L5, thoracic spondylosis at T3, T4-5, disc bulging at T5 or osteophytes at T10-12; and that the respondent/cross-appellant (carrier) did not waive the right to contest the compensability of the claimed injury by not timely contesting in accordance with Sections 409.021 and 409.022. The appellant/cross-respondent (claimant) appealed, disputing the waiver determination as well as the determination that the compensable injury does not include disc bulging at C4-5 and C6-7, lumbar spondylosis at L5, thoracic spondylosis at T3, T4-5, disc bulging at T5 or osteophytes at T10-12. The carrier responded, urging affirmance of the determinations disputed by the claimant. The carrier additionally filed an appeal disputing the determination that the compensable injury includes a herniation at C3-4 and C5-6. The appeal file does not contain a response from the claimant to the carrier's appeal.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant testified that she was injured on ____, while handing a frozen box of meat to a co-worker. The evidence reflected, and the hearing officer found, that the carrier first received written notice of the injury on February 28, 2005. This finding was not appealed by either party. The only dispute in evidence was filed by the carrier on June 23, 2005. The carrier argues that the 60-day deadline does not apply in this case because the dispute it filed after the initial 60-day period was an extent-of-injury dispute.

The provision of Section 409.021(a) effective for a claim for benefits based on a compensable injury that occurred on or after September 1, 2003, provides that not later than the 15th day after the date on which an insurance carrier receives written notice of an injury, the insurance carrier shall begin the payment of benefits as required or notify the Texas Department of Insurance, Division of Workers' Compensation and the claimant in writing of its refusal to pay benefits. Section 409.021(a-1) further provides that if an insurance carrier fails to comply with the 15th day requirement, the carrier does not waive its right to contest compensability but rather commits an administrative violation. It is Section 409.021(c) that then defines the waiver period. It provides that if an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability. The carrier did not file a dispute on or before the 60th day after it was notified of the injury. The hearing officer's determination that the carrier did not waive the right to contest the compensability of the

claimed injury by not timely contesting in accordance with Sections 409.021 and 409.022 is reversed and a new determination rendered that the carrier did waive the right to contest the compensability of the claimed injury by not timely contesting in accordance with Sections 409.021 and 409.022.

The parties stipulated that the claimant sustained a compensable thoracic sprain/strain injury on _____. The nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. See Appeals Panel Decision 041738-s, decided September 8, 2004. In evidence was a medical note dated April 13, 2005, which indicated that MRIs of the thoracic and cervical spine would be scheduled due to six weeks of symptoms without improvement. MRIs of both the cervical and thoracic spine were taken on April 14, 2005. The hearing officer noted that the evidence indicated the carrier received the MRIs after the 60-day period. It is not the actual receipt of information by the carrier that will define the injury that was waived but rather what the carrier could have reasonably discovered within the waiver period. The thoracic MRI dated April 14, 2005, listed in its findings minimal spondylosis in the upper thoracic spine consisting of mild disc desiccation at T3 through T5; minimal bulging annulus at T4-5; and osteophytes from T10 through T12. The cervical MRI dated April 14, 2005, listed in its findings a small central herniated nucleus pulposus (HNP) at C3-4; a small midline HNP at C5-6; and mild bulging at C4-5 and C6-7. The hearing officer notes that no medical reports link the lumbar findings to the compensable injury within the 60 days. However, the back was consistently noted in the medical records and reports as the body part that was injured in the work-related incident. A lumbar x-ray dated March 21, 2005, noted spondylolisthesis with spondylolysis at L5. The lumbar x-ray did not note spondylosis at L5. There is no record diagnosing the claimant with spondylosis at L5 prior to the expiration of the waiver period. Further, there is no evidence in the record that the claimant has ever been diagnosed with spondylosis at L5.

The hearing officer's finding that the carrier, through a reasonable investigation, could not have determined within 60 days that the cervical and lumbar spine, as well as underlying degeneration of the thoracic spine was part of the claimed injury is against the great weight and preponderance of the evidence. The fact that the carrier actually received the diagnostic testing of the cervical and thoracic spine outside the waiver period does not mean that the carrier could not have discovered the results of the diagnostic testing through a reasonable investigation prior to the expiration of the waiver period. Both the thoracic and cervical MRIs were performed within the waiver period. As previously stated the nature of the injury that becomes compensable by virtue of waiver is defined by the information that could have been reasonably discovered by the carrier's investigation prior to the expiration of the waiver period. The hearing officer's determination that the compensable injury does not include disc bulging at C4-5 and C6-7, thoracic spondylosis at T3, T4-5, disc bulging at T5, and osteophytes at T10-12 is reversed. The evidence reflects that information which identified herniations at C3-4 and C5-6; disc bulging at C4-5 and C6-7; thoracic spondylosis at T3, T4-5, disc bulging at T5, and osteophytes at T10-12 could have been reasonably discovered by the

carrier's investigation prior to the expiration of the waiver period. Therefore, these conditions become compensable as a matter of law. We render a new determination that the compensable injury of ____, includes disc bulging at C4-5 and C6-7; thoracic spondylosis at T3, T4-5; disc bulging at T5, and osteophytes at T10-12. We affirm the determination that the compensable injury of ____, includes a herniation at C3-4 and C5-6. We affirm the determination that the compensable injury of ____, does not include lumbar spondylosis at L5.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge